

IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. ———

MARY SUE MAGRUDER, *Petitioner*,

v.

CHRISTINE MAGRUDER, HARRY F. MAGRUDER, ALICE E. MOSE,
ET AL., *Respondents*.

BRIEF IN SUPPORT OF PETITION.

Text of Sections 16-1301, 16-1302, and 16-1305, District of Columbia Code (1940 ed.).

16-301 (25:381). Partition—When granted—Parties—Accounting by tenant in common.

The equity court may decree a partition of any lands, tenements, or hereditaments on the bill or petition of any tenant in common, claiming by descent or purchase, or of any joint tenant or coparcener; or if it appear that said lands, tenements, or hereditaments cannot be divided without loss or injury to the parties interested, the court may decree a sale thereof and a division of the money arising from such sale among the parties, according to their respective rights; and this section shall apply to cases where all the parties are of full

age, to cases where all the parties are infants, to cases where some of the parties are of full age and some infants, to cases where some or all of the parties are non compos mentis, and to cases where all or any of the parties are non-residents; and any party, whether of full age, infant, or non compos mentis, may file a bill under this section, an infant by his guardian or prochein ami and a person non compos mentis by his committee: Provided, That in every case of partition any tenant in common who may have received the rents and profits of the property to his own use may be required to account to his cotenants for their respective shares of said rents and profits, and any amounts found to be due on said accounting may be charged against the share of the party owning the same in the property, or its proceeds in case of sale. (Mar. 3, 1901, 31 Stat. 1203, ch. 854, Sec. 93; June 30, 1902, 32 Stat. 523, ch. 1329.)

16-1302 (25:382): Assignment of dower—Appointment of commissioners—Cases of partition.

Whenever any person or persons shall hold real estate, by descent or purchase, in the whole of which a widow is entitled to dower, either the widow or any person entitled to said property or an undivided share therein may apply to said court to have the widow's dower therein assigned; and thereupon the court shall appoint three commissioners to lay off and assign said dower, if practicable, the report of said commissioners to be subject to ratification by the court. In all cases of partition between two or more joint tenants or tenants in common of real estate, in the whole of which a widow is entitled to dower, the said dower shall be laid off and assigned, in like manner, before said partition shall be decreed. When an estate of which a woman is dowable is entire, and the dower can not be set off thereout by metes and bounds, it may be assigned by the court as of a third part of the net rents, issues, and

profits thereof. (Mar. 3, 1901, 31 Stat. 1202, ch. 854, Sec. 86.)

16-1305 (25:385): Sale of land encumbered by dower—Lack of consent—Consent in writing—Her portion.

Whenever a decree is rendered for the sale of land, in the whole of which a widow is entitled to dower, if she will not consent to a sale of the same free of her dower, the court may, if it appears advantageous to the parties, cause her dower to be laid off and assigned as aforesaid. If she will consent in writing to the sale of the property free from her dower, the court shall order the same to be sold free of her dower, and shall allow her, in commutation of her dower, such portion of the net proceeds of sale as may be just and equitable, not exceeding one-sixth nor less than one-twentieth, according to the age, health, and condition of the widow. (Mar. 3, 1901, 31 Stat. 1202, ch. 854, Sec. 86.)

ARGUMENT.

I. It is Settled Law That the Construction of a Statute by a State Becomes Part of That Statute When It is Adopted by Congress.

The applicable portions of Sections 16-1301, 16-1302, and 16-1305, are mirrored in Article 16, Sections 46, 48, 50 and Article 46, Section 39 of the Annotated Code of Maryland, (1939 ed.), as follows:

An. Code, 1924, sec. 43. 1912, sec. 42. 1904, sec. 41. 1888, sec. 41. 1840, Ch. 98.

46. The several courts of equity shall have full concurrent jurisdiction with the courts of law in all claims for dower, and shall have power to try all questions of law which may arise in such cases, and give as full relief in any case as the plaintiff could have obtained heretofore, in either a court of equity or a court of law, or in both courts.

An. Code, 1924, sec. 45. 1912, sec. 44. 1904, sec. 43. 1888, sec. 43. 1799, ch. 49, sec. 6. 1816, ch. 154, sec. 10. 1818, ch. 193, sec. 8. 1819, ch. 183. 1820, ch. 191, sec. 28.

48. In all cases where lands and tenements are to be sold under a decree, and the widow who is entitled to dower in such lands will consent in writing to the sale of the entire estate therein, the court shall order the same to be sold free from any claim of dower, and allow the widow such portion of the net proceeds of sale as may be just and equitable, not exceeding one-seventh nor less than one-tenth, according to the age, health and condition of such widow.

An. Code, 1924, sec. 47. 1912, sec. 46. 1904, sec. 45. 1888 sec. 45. 1816, ch. 154, sec. 11. 1820, ch. 191, sec. 27. 1880, ch. 222.

50. Where there is a decree for the sale of lands, and a widow is entitled to dower therein, and will not consent to a sale of her dower, the court may, if it appears advantageous to the parties, appoint five commissioners to assign and lay off the dower of such widow; and any person holding land by descent, devise or purchase, subject to a widow's dower therein, may apply to the court sitting in chancery for the assignment of such dower, and the court thereupon shall appoint five commissioners to assign and lay off the same, subject in either case to confirmation or rejection by the court.

An. Code, 1924, sec. 38. 1912, sec. 63. 1904, sec. 63. 1888, sec. 63. 1799, ch. 49, sec. 6. 1820, ch. 191, sec. 28.

39. In case of sale of the intestate's real estate by the commissioners, if the widow will consent to the sale, she shall signify and subscribe her consent in writing, and the same shall be filed with the clerk of the court, and thereupon the said commissioner shall proceed to sell the whole real estate, agreeably to the terms prescribed to them, disencumbered of any right of dower, and the court shall award to the widow such propor-

tion of the purchase money as shall be just and equitable, not exceeding one-seventh part nor less than one-tenth part of the net amount of the sales, according to the age, health, and condition of such widow, and such award of payment shall be a sufficient bar to all right of dower which such widow may claim in said lands.

The historical background of the Acts of March 3, 1901, and June 30, 1902, aforesaid, is described in Volume I, District of Columbia Code (1940 ed.), pages IX to XIV. A comparison of the language of these respective statutes leaves no room for doubt as to their origin.

The principle that real estate owned by tenants in common, subject to the widow's dower, cannot be sold free of dower without the consent of the widow was settled in Maryland as early as 1861 in *Phelps v. Stewart*, 17 Md. 231, when the court said at page 240:

"The Act of 1821, ch. 191, Sec. 27, expressly requires the dower to be laid off and assigned before partition among the heirs, unless a sale be had, with her assent, as provided by the 28th Sec." (Sec. 27 and 28 are now Secs. 50 and 48, respectively of Art. 16, Code of Maryland.)

In 1894, the same principle was reaffirmed in *Stein v. Stein*, 80 Md. 306, 30 Atl. 703, when the court said at page 704:

"It follows from what we have said—First, that the trustees appointed to make sale of the property referred to in the case stated have no power to make the sale clear of the widow's dower, without her consent in writing;"

The principle that the real estate cannot be sold free of dower without the widow's consent thus established in the cases of *Phelps v. Stewart*, and *Stein v. Stein*, *supra*, was confirmed in 1906 in *Shipley v. Mercantile Trust Co.*, 102 Md. 649, 62A. 814, when the court said at page 818:

“The argument for the appellant upon this branch of the case is founded upon the assumption that the bill prays for a sale free of dower, without her consent, and that the decree authorizes such a sale; but this we think is not the true construction of the bill or of the decree. If it were, we could not hesitate to hold that a widow cannot be deprived by any direction of the testator who has devised his estate to others, subject to her dower, nor by any decree of court, of the right to have her dower assigned, if she elects to exercise her rights.”

When Congress in 1901 enacted Sections 16-1301, 16-1302, and 16-1305, the construction of these provisions with respect to a sale of land, subject to dower, had been settled in Maryland for forty years. Under the decisions of this Court, the rule of *Phelps v. Stewart*, and *Stein v. Stein*, *supra*, became an integral part of Sections 16-1301, 16-1302, and 16-1305, of the District of Columbia Code.

Metropolitan R. R. Co. v. Moore, 121 U. S. 558, 572.
Willis v. Eastern Trust Co., 169 U. S. 295, 307.
Capital Traction Co. v. Hof, 174 U. S. 1, 36.
Joiner v. Patterson, 274 U. S. 544, 549.
Grayson v. Harris, 279 U. S. 300, 303.

In *Capital Traction Co. v. Hof*, *supra*, this Court said, p. 36:

“By a familiar canon of interpretation, heretofore applied by this court whenever Congress, in legislating for the District of Columbia, has borrowed from the statutes of a State provisions which had received in that State a known and settled construction before their enactment by Congress, that construction must be deemed to have been adopted by Congress together with the text which it expounded, and the provisions must be construed as they were understood at the time in the State.”

The Court of Appeals has heretofore recognized and applied this principle.

Hawley v. Hawley, 72 App. D. C. 376, 380, 114 F. 2d 745.

It seems clear, therefore, that the Court of Appeals erred (R. 5-8) in refusing to adopt the settled construction of the Maryland decisions that in the circumstances of this case, the real estate cannot be sold free of dower without the widow's consent.

II. The Court of Appeals Has Decided a Question of General Importance, and a Statute of the United States, Which Has Not Been But Should be Settled by This Court.

It is apparent that the question whether real estate owned by tenants in common, subject to dower, may be sold free of dower without the widow's consent, is one of national concern as well as of local importance in the District of Columbia.

Sections 16-1301, 16-1302, and 16-1305 are rather similar to State statutes dealing with the same subject matter and it is surprising that research has discovered but few appellate decisions on the precise question involved herein. No decision has been found prior to the decision by the Court of Appeals in this case, holding that under similar statutes the court may order a sale of real estate free of dower without the widow's consent. The following cases hold uniformly that such a sale free of dower cannot be made without the widow's consent:

Phelps v. Stewart, supra.

Stein v. Stein, supra.

Shipley v. Mercantile Trust Co., supra.

Hasler v. Williams, Equity No. 28248, Supreme Court, D. C. (now U. S. District Court for the District of Columbia), affirmed on other grounds, 34 App. D. C. 319.

Haugh v. Peirce, 97 Me. 281, 54A. 727.

Jenks v. Terrell, 73 Ala. 238.

Conversely, it has been held that the widow cannot force the sale of land in order to get money in lieu of dower, nor

can she have her dower valued in money and force the heirs to pay her or submit to a sale.

Conrad v. Crouch, 68 W. Va. 378, 69 S. E. 888.

Lee v. James, 81 Ky. 443.

CONCLUSION.

In the light of the foregoing facts and authorities it is respectfully submitted that this Court should issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia in this cause.

Respectfully submitted,

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